VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

WE call attention to the volume index accompanying this, the final number of our third volume. In the preparation of the index, we have endeavored to bear in mind Mr. Bishop's pithy saying that "what is not in the index is not in the book," and we hope our readers may find this index a ready key to everything in the volume.

WE are indebted to the Judges of the United States Court of Appeals (Fourth Circuit) recently in session at Richmond, for copies of a number of opinions rendered at the last session. Two of these opinions we publish in full, in the present number.

THIS number completes Volume III of the VIRGINIA LAW REGISTER. If, notwithstanding its shortcomings, the REGISTER has served in some measure to further the science of jurisprudence in Virginia, or to lighten the labors of the Virginia bar, it has been accomplishing the work it set out to do, and our labor has not been without reward.

The bar of the State have supported the enterprise most liberally. Probably no local law journal in the country has met with a more generous patronage at home. So that on this score, we have no complaint to enter. But the request, already several times made, that members of the bar will contribute more freely to our columns is repeated, with emphasis. No intelligent lawyer in the State imagines that the mission of the REGISTER is to make money. A local law journal can hope to do little more than pay expenses. We feel, therefore, that our work, whether valuable or not, is largely a gift to our professional brethren, few of whom have a true conception of the labor involved. Hence, when the REGISTER appeals to the profession of the State for contributions to its pages, it is not wholly in the attitude of one soliciting favors.

This makes an opportunity to say that we cannot publish obituary resolutions, upon the death of lawyers and judges Sketches of deceased lawyers who have distinguished themselves at the bar or on the bench, are always acceptable if not in the form mentioned. But formal and perfunctory resolutions, adopted by local bars upon the death of members, are usually lacking in general interest; and where otherwise, discrimination is impossible without giving offense, and we have not

space for all. We repeat, however, that our columns are freely open to such memorials as we have described.

We are sincerely grateful to those members of the bar who have already appeared as contributors in our columns, and we again extend a general invitation to every lawyer who has an idea worth preserving, to have it recorded in our pages. Contributions need not be in the form of elaborate papers. A brief note in the correspondence department, calling public attention to some new phase of the law—some curious point decided at *nisi prius*—the construction of some statute—an anecdote—a reminiscence—a query—will serve to add variety and interest to the contents. It is the habit of contribution that needs to be encouraged. Once begun, it is contagious.

We are especially indebted to our friend, M. P. Burks, State Reporter, for more courtesies than we can here express or hereafter repay.

In contemplating the close of this volume we may not forget him who was editor in chief when its earlier numbers were issued, but the book of whose noble life has been closed these many months. The need of his wise counsel and sound judgment has been sorely felt, but his example has been an inspiration, and out of remembrance of his interest in the journal has come a keener ambition for its success.

NEGOTIABLE INSTRUMENTS LAW—We learn that the Negotiable Instruments Law suggested by, and prepared under the supervision of, the American Bar Association, in the interest of uniformity of the law of this subject throughout the Union, was adopted by the Virginia legislature, recently adjourned. Up to the time of going to press, we have not been able to procure a copy of the act, as passed. We have at hand a copy of the law as adopted in New York, Connecticut, Colorado, Florida and several other States, but have no means of ascertaining whether the Virginia Act is identical with this or not. We hope to notice the Act more at length hereafter.

DEED OF TRUST ON STOCK OF GOODS.—We publish elsewhere a paper by J. R. Tucker, Esq., of the Bedford bar, on a subject of much practical importance—the validity of a mortgage or deed of trust on a stock of goods, without possession taken by the mortgagee or trustee, and with power in the grantor to continue his sales as before. We have made no recent examination of the Virginia authorities on the subject, but our impression is, that whatever may be the law in other States, such a transaction cannot be sustained in Virginia, even under the qualified circumstances stated by Mr. Tucker. The Virginia authorities are cited in Mr. Tucker's paper, and our readers may examine them for themselves. In many of the States the doctrine of frand *per se*, conclusively drawn from the face of a mortgage or deed of trust, does not obtain—and the plaintiff who alleges the fraud in such case must prove it. But in Virginia that doctrine prevails in full force, as shown in the cases cited in the paper referred to. And where the security is fraudulent on its face, no extrinsic evidence of good faith will save it from the condemnation of the courts. See *Long* v. *Meriden Brittania Co.*, 3 Va. Law Reg. 287; 27 S. E. 499.

Freeman's monographic note in 15 Am. St. Rep. 912, is an extremely valuable

contribution to the literature of this subject. The conclusion there reached is thus stated (p. 916):

"An examination of all the cases on this much vexed and disputed question has only strengthened our belief that such mortgages as we have been considering, should be held fraudulent and void *per se*, and so declared by the court. It also appears to us that the weight, as well as the reason, of modern authority tends to this conclusion; . . . . and the reason is that a mortgage which, by its terms, or by a verbal agreement between the parties, allows the mortgagor to sell the property mortgaged, serves to give the mortgagor a false credit, and affords the mortgagee no security whatever; for it makes it possible for the mortgagor, at any time, to sell the property as his own and appropriate the proceeds to his own benefit and purposes, and consequently it is possible for the debtor, in every instance, so to use such instrument as to deprive the mortgagee of all security, and yet to make the mortgage serve as an effectual shield to protect his property from his creditors. For these reasons, we think, though it may work a hardship in individual cases where no fraud is in fact intended, public policy demands that such mortgages should be conclusively presumed fraudulent and void, as such stipulations are not only inconsistent with the idea of a mortgage, but tend invariably and inevitably to give a fraudulent advantage to the debtor over his *bona fide* creditors." See 2 Va. Law Reg. 62.

WIFE'S RIGHT OF ACTION FOR LOSS OF CONSORTIUM.—The right of a married woman abandoned by her husband, to maintain an action against the person who induced the abandonment, is sustained in *Brown* v. *Brown* (N. C.), 38 L. R. A. 242, without any express provision therefor, where the statutes allow her to contract as a free trader, and also to set up, if sued for a tort, any counter-claim growing out of the same transaction, and have an affirmative judgment.

While there are a few cases opposed to the notion of an action by the wife for alienation of the husband's affections, most of the modern cases sustain the wife's right of action. She could not sue at common law, because the husband had to be united, and the damages went to him. Under modern statutes this difficulty is removed. See *Westlake* v. *Westlake*, 34 Ohio St. 691 (32 Am. Rep. 397); *Foot* v. *Card*, 58 Conn. (18 Am. St. Rep. 258 and note); *Bennett* v. *Bennett*, 116 N. Y. 845; *Waldron* v. *Waldron*, 45 Fed. 315; *Clow* v. *Chapman* (Mo.), 28 S. W. 328 (46 Am. St. Rep. 468, and extensive note); *Hodgkinson* v. *Hodgkinson*, (Neb.), 47 Am. St. Rep. 759; *Smith* v. *Smith* (Tenn.), 38 S. W. 439.

A CONVEYANCE in fee to a corporation which has a limited existence is held, in *Wilson* v. *Leary* (N. C.) 38 L. R. A. 240, to extend beyond the life of the corporation, and not to create a resulting trust in the grantor to take effect when the corporation ceases to exist.

A RIGHT of action against a commander of revolutionary forces in another country for assault and false imprisonment is denied, in *Underhill* v. *Hernandez* (C. C. App. 2d C.) 38 L. R. A. 405, affirmed in 168 U. S. 250, 42 L. ed. 456,—especially after the revolutionary government has been established and recognized by the United States government, even if the acts complained of were performed before the revolution became successful.

BAILMENTS—INJURY BY NEGLIGENCE OF THIRD PERSON—CONTRIBUTORY NEGLIGENCE OF BAILEE.—The opinion of the Supreme Court of New Jersey, in *New York etc. R. Co.* v. *New Jersey etc. Railway Co.*, 38 Atl. 828, contains a learned discussion of the question whether the contributory negligence of a bailee of personal property, injured by the negligence of a third person, will defeat an action. by the owner against the wrong-doer whose negligence caused the injury. The plaintiff company was owner of a locomotive and cars temporarily hired to another railroad company. By the conjoint negligence of the latter and of the defendant, an electric railway company, a collision occurred between the locomotive and cars belonging to the plaintiff and a car belonging to the defendant, in which the locomotive and cars were damaged. In an action to recover the damages, the electric car company set up the contributory negligence of the company operating (as hirers) the injured engine and cars.

As shown in the opinion there is some authority for the position that the bailee in such case is to be regarded as the servant of the bailor, and his contributory negligence attributed to the bailor. But these authorities rest on the English case of *Thorogood* v. *Bryan*, 8 C. B. 114, since overruled in England, in the *Bernina Case*, 12 Prob. Div. 58, and repudiated by most of the American courts, including the Supreme Court of the United States. *Little* v. *Hackett*, 116 U. S. 366.

The court adopts the principle that the bailee's servants are not the servants of the bailor, and the contributory negligence of the former cannot be set up in defence to an action by the latter.

INTERSTATE COMMERCE—CARRIERS.—The decision of the Virginia Court of Appeals, in *R. & A. Railroad Co.* v. *R. A. Patterson Tobacco Co.*, 92 Va. 670, sustaining the constitutionality of sec. 1295 of the Virginia Code, providing that where a common carrier accepts goods for transportation beyond his own line, he shall be responsible for losses or injuries happening on other lines, unless there be a written contract, signed by the shipper, exempting the carrier from such liability, has been affirmed on appeal to the Supreme Court of the United States—Mr. Justice White delivering the opinion.

The shipment in this case was from Richmond, Virginia, to a point in Texas. The statute was vigorously assailed on the ground that so far as it applied to shipments beyond the limits of the State, it was a regulation of interstate commerce and therefore beyond the legitimate scope of State legislation. The Virginia Court of Appeals held, and the United States Supreme Court adopts that view, that if the statute had prohibited the carrier from contracting for exemption beyond his own line, it could not have been upheld in the case of shipments beyond the State. But that the statute gives the carrier the right to make his own contract, assuming or exempting himself from liability beyond his own line; and merely prescribes a rule of evidence by which his contract for exemption shall be proved. Says Mr. Justice White:

"That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as to liability on an interstate shipment beyond its own line as it may deem proper, provided only the evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is as obvious as is the

difference between the sum of the obligations of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

"The failure to bear this plain distinction in mind is the fallacy which is involved in all the contentions which are pressed by the plaintiff in error. It is of course elementary that where the object of a contract is the transportation of articles of commerce from one State to another that no power is left in the States to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several States to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress, by general legislation, has undertaken to govern the subject. . . . Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of *Chicago &c. Railway Co.* v. *Solan* (169 U. S. —), it was said, p. —:

'They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

'Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions, or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628. See, also, *Telegraph Co.* v. *James*, 162 U. S. 650; *Hennington* v. *Georgia*, 163 U. S. 299; *Gladson* v. *Minnesota*, 166 U. S. 427.'"

AN injunction to restrain the diversion of water from a mill dam is held, in *Scott* v. *Jefferson* (Mich.) 38 L. R. A. 355, to be maintainable, although the injury from the diversion may be trivial compared with that suffered by the persons who are prevented from making the diversion.

AN action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian and intrusted the child to the hospital for treatment, is held, in *Burney* v. *Children's Hospital* (Mass.) 38 L. R. A. 413, to be sustainable, notwithstanding the contention that there was no right of property in a dead body.

STATUTE OF LIMITATIONS—BREACH OF WARRANTY.—In *Siebert* v. *Bergman*, (Tex.) 44 S. W. 63, it is held that the existence of a lien on property conveyed with a covenant against incumbrances, operates as a technical breach, but since damages to the vendee result only from a foreclosure of the lien, the statute of limitations runs against the covenant only from the foreclosure.

Says Brown, J :

"The right of action for the actual damages sustained by the appellees by the breach of the covenant did not arise until the land was sold under the judgment enforcing it, although the incumbrance existed when the deed was executed. *Prescott* v. *Trueman*, 4 Mass. 629; *Andrews* v. *Davison*, 17 N. H. 413; *Moore* v. *Merrill*, Id. 75; *Funk* v. *Voneida*, 11 Serg. & R. 110; *Reed* v. *Pierce*, 36 Me. 455; *Post* v. *Campau*, 42 Mich. 90, 3 N. W. 272; *Wyatt* v. *Dunn*, 93 Mo. 459, 2 S. W. 402, and 6 S. W. 273. The statute of limitation did not begin to run until the covenantee could maintain a suit to recover the damages sustained by the breach of the covenant. In commenting upon the position taken, that the cause of action accrued when the deed was made, Judge Cooley, in the case of *Post* v. *Campau*, before cited, said: 'As the terms of the covenant sued upon were falsified by facts existing at the time, a technical breach may be said to have then taken place; but as no damage followed from this breach, until the claimant purchased from Butler more than ten years afterwards, the rule that the claimant's right of action shall be deemed to have arisen at the delivery of the deed involves this manifest absurdity: that the claimant's remedy was barred before he was damnified—a result that can scarcely be consistent with any just or proper rule of law.' This clear and forcible statement of the proposition effectually refutes the claim that, upon the making of a covenant against existing incumbrances, the statute of limitation commences to run against an action to recover actual damages thereon when such damages do not accrue at the same time.

From the foregoing well-sustained propositions it follows that the statute of limitations could not begin to run in this case until the land was sold in the enforcement of the incumbrance, because, up to that time, the covenantee had lost nothing, and could have maintained no action, except for nominal damages, which would have been no recompense for the injury afterwards suffered by the eviction. This conclusion is sustained, in able and well-considered opinions, in the cases of *Post* v. *Campau*, 42 Mich. 90, 3 N. W. 272, and *Wyatt* v. *Dunn*, 93 Mo. 459, 2 S. W. 402, and 6 S. W. 273, which we have before cited."

WILLS—PAROL TRUSTS.—In *Sims* v. *Sims*, 27 S. E. 436, the Virginia Court of Appeals held that the statute which requires wills to be in writing, forbids the engrafting of a parol trust upon a bequest which is absolute in terms, or which is designated as in trust, without declaring the character of the trust. In this case the gift was declared to be in trust, to be disposed of by the legatee according to verbal directions given him by the testator. It appeared by implication, from another part of the will, however, who the intended beneficiary was, but not the terms upon which he was to enjoy the bounty. The court held, in accordance with what seems to be the approved doctrine, that parol evidence could not be received to establish the terms of the trust, and that the legatee took a naked legal title, with the absolute equitable estate in the beneficiary. Similar principles were established in the previous case of *Sprinkle* v. *Hayworth*, 26 Gratt. 384. In

that case a husband and wife, without children, verbally agreed between themselves that the survivor of the two should enjoy, for his or her life, the property of the consort first dying, and at the death of the survivor the entire property of both should be equally divided amongst the heirs and next of kin of the two. The husband accordingly made his will, by which he gave his whole estate to his wife absolutely. She survived him, but died the next day intestate. A suit on the part of the husband's heirs and next of kin to establish a parol trust in their favor, was held not maintainable.

An established exception to this doctrine is that if the legatee or devisee induce the testator not to declare the trust in the will, he will not be allowed to profit by his breach of trust. *Sims* v. *Sims*, *supra*; *Towles* v. *Burton* (So. Car.) 29 Am. Dec. 409 and note. These principles are sustained in the recent case of *Moran* v. *Moran* (Iowa), 73 N. W. 617.

STATUTE OF PAROL AGREEMENTS—REPRESENTATIONS AS TO CREDIT OF ANOTHER.—That section of the statute of parol agreements which provides that no action shall be brought "to charge any person upon or by reason of a representation or assurance, concerning the character, conduct, credit, ability, trade or dealings of another, to the intent or purpose that such other may obtain thereby credit, money or goods," unless in writing, etc.—added to the famous fourth section of the Statute of Frauds by Lord Tenterden's Act in 1829, and adopted in a few of the American States (by Virginia in 1840–41, Virginia Code, 1897, sec. 2840, sub-sec. 1)—has probably been before the courts less frequently than any other clause of that memorable statute.

It is common to say that as the Statute of Frauds was enacted for the prevention of fraud, it will not be allowed to serve as a cover for the perpetration of fraudulent practices. But this observation does not apply to the clause in question. Under the shield of this clause rascality may flourish and bid defiance to the courts.

Thus, in *Haslock* v. *Fergusson*, 7 Ad. & El. 86, Barnes, a merchant, owed Fergusson a debt, which the latter seemed in a fair way to lose, because of his debtor's financial embarrassment. Barnes, after arranging for some extension with Fergusson, applied to Haslock for credit for a large bill of goods, and gave Fergusson as reference. The latter verbally gave her "a fair character," upon the strength of which the credit was extended. The goods were at once disposed of by Barnes, part of the proceeds were paid to Fergu-son, and Barnes went into bankruptcy. Fergusson successfully retreated behind the statute, and the deluded Haslock took nothing by his action for money had and received against him.

In *Swann* v. *Phillips*, 8 Ad. & El. 457, Phillips, an attorney, applied to Swann for a loan to his client, Jellicorse, with the verbal assurance that Jellicorse's note would be good security, and that he, the attorney, held certain securities belonging to the proposed borrower, out of which the lender might expect payment. The latter statement was false, and Swann lost her debt. She doubtless lost her temper also, to say nothing of her faith in law and lawyers, when she brought assumpsit against the wretch who had thus betrayed her, and was defeated by a plea of Lord Tenterden's amendment.

In *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84, the defendant made false representations as to the financial condition of the concern of which he was a member,

whereby the plaintiff credited the firm for a large amount. In an action for the deceit, he was held not liable, because the representation was not in writing.

This clause of the statute has been adopted in comparatively few of the American States, and cases construing it are rare. In Freeman's note, 25 Am. Dec. 450–1, it is said to exist only in Alabama, Indiana, Maine, Massachusetts, Michigan, Missouri, Vermont, Virginia, West Virginia and Wyoming.

The subject was recently before the Appellate Court of Indiana, in the case of *Heintz* v. *Mueller*, 49 N. E. 293 (Feb. 2, 1898). The defendant, acting as agent of a corporation, had succeeded in inducing the plaintiff to subscribe for a number of shares in the corporation, by means of verbal representations as to its property and prospects. The action was against the agent for deceit, the plaintiff alleging that the representations were false, and known to the defendant to be so, when he made them. It was held that the action could not be maintained, by reason of the statute. We reproduce so much of the opinion as deals with this question:

"The sixth section of our statute of frauds (being section 6634, Burns' Rev. St. 1894; section 4909, Horner's Rev. St. 1897) provides: 'No action shall be maintained to charge a person by reason of any representation made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation be made in writing and signed by the party to be charged thereby, or by some person thereunto by him legally authorized.' In *Cook* v. *Churchman*, 104 Ind. 141, 3 N. E. 759, this statutory provision is discussed and applied. It is there held that: 'Where representations are made concerning the credit, ability, etc., of another by one not a party to the transaction, but with intent that the person concerning whom they are made shall obtain credit upon such representations, then, even though fraudulent, they are nevertheless within the statute.' The form of the action is an immaterial matter, if to sustain the action such representations must be proved. *Cook* v. *Churchman*, *supra*.

"While the statute, in the form in which it has been enacted in this State, does not expressly require that the representations be made with a particular intent, it is held in *Cook* v. *Churchman*, *supra*, that our statute is in all respects the equivalent of Lord Tenterden's Act, and it is said that one of the tests whether a case is within the statute or not is whether the representations were made with the purpose to establish the credit or pecuniary ability of another. See *Medbury* v. *Watson*, 6 Metc. (Mass.) 246; *Norton* v. *Huxley*, 13 Gray, 285. It is further stated in *Cook* v. *Churchman*, *supra*, that it is immaterial that the person making the representation may have had some design of obtaining an incidental advantage to himself as a result of the credit intended to be secured thereby, and that, when such representations are made with the intention that a third person shall, in the first instance, obtain credit, money, or goods thereupon, they must be in writing, in order to give a cause of action against the person making them. It was further held that representations made with a view to establish the general credit and pecuniary ability of another are not taken out of the statute by the fact that they are made concerning his particular property and assets. In the case before us the representations are not shown to have been made in reference to an alleged corporation which in fact had no existence, or to obtain a transfer of property or money from the appellee to the appellant, or to him and others, or to obtain credit for the appellant, or for him and others, however it might be supposed that he would have derived a profit incidentally if it had been directly stated that he was a stockholder;

nor are the representations shown to have been made in reference to the character, conduct, etc., of the appellant himself, or to induce the appellee to purchase property from the appellant or the corporation. If it can be said—as we think it may—that it is shown that the representations were made by the appellant to establish the general credit or ability of the corporation with the intent that it should obtain money thereon, such representations not being in writing, signed by appellant, or by some person thereunto by him legally authorized, they cannot be the basis of an action against him. If the elements of fraud be sufficiently shown—as to which we make no decision—this would not alter the case. . . . .

"In *Bush* v. *Sprague*, 51 Mich. 41, 16 N. W. 222, in the second paragraph of the complaint it was sought to charge the defendants by reason of favorable representations concerning the credit, etc., of a corporation in which the defendants were officers, relying upon which the plaintiff was induced to purchase of the corporation a certain number of shares of stock therein for a certain sum paid to it. There were differences among the judges upon some questions involved in the case, but there does not appear to have been any dissent from the view that, if there be a payment of money to a corporation for shares of its capital stock upon favorable representations of a single member of the corporation concerning its credit, etc., such a changing of property from cash into stock would be an obtaining of money by the corporation upon the exaltation of its credit and ability, within the contemplation of the statute. The case, as stated in the complaint, seems to be within the statute."

SPECIAL SELLING FACTOR APPOINTMENTS.—Many devices have been resorted to within the last few years by which great manufacturing concerns, enjoying a practical monopoly of certain lines of trade, have undertaken to control prices at which retailers shall sell such goods. The device usually assumes the form of an agency. The retail dealer is called "agent" in the contract, and many ingenious phrases are introduced so as to make him an agent in fact, for purposes of being controlled by the seller, and yet a buyer so far as his responsibility for the value of the shipment is concerned. The following contract between the Drummond Tobacco Company and one of its customers was recently before the Court of Civil Appeals of Texas. (*Williams* v. *Drummond Tobacco Co.*, 44 S. W. 186):

"First. We hereby appoint you our agent, to sell our tobaccos at such prices as we may designate by our price cards as issued from time to time, the title to said tobaccos to remain in us until sold by you. Second. For acting as such agent, we will pay you a commission, to be determined by us from time to time, on all sales you make for us. In consideration of this commission, you warrant that every shipment made to you shall be paid for in full. Third. If, within ten days after any shipment, you make cash advances on such shipment, we will fix and pay you an extra commission therefor, the advances to be entirely at the risk of your reimbursing yourself out of the tobacco shipped. Fourth. You are to insure all tobacco shipped against loss for cash advances made, or on account of your above warranty. Fifth. We will pay your commission every sixty days, but, if you sell our tobaccos at less than prices designated by us, we reserve the right to retain any part or all of such commission as may be unpaid at the time of such

sale. We reserve the right to terminate this commission agency at any time at our option."

It was the custom of the shippers, after each consignment, to take a sixty days' acceptance from the customer, for the invoice price of the tobacco shipped, which he was expected to pay, whether he had sold the tobacco or not.

The customer, with a large lot of tobacco on hand, under this contract, made a general deed of assignment, in which the tobacco was assigned along with the rest of his property. The Drummond Tobacco Company sought to recover the tobacco from the assignee. The court held that though the parties had called themselves principal and agent in their contract, their real relation was to be determined from the substance and not the form of the contract, and that the contract was in effect one of sale and purchase.

"We find ourselves," says Finley, C. J., "unable to reach the legal conclusions pronounced by the trial judge. On the contrary, we think the facts found to be true, clearly manifest that the intention of the contracting parties was that title to the tobacco should pass from the Drummond Tobacco Company to A. H. Schluter & Co. It appears to us that every element necessary to a sale of personal property is to be found in the terms of the contract between these parties. A. H. Schluter & Co. became absolutely bound to pay in full for every shipment of the tobacco made to them. They were given no right to return the tobacco under any circumstances, and the Drummond Tobacco Company did not reserve the right to retake the tobacco. The dealings of the parties clearly show that it was never contemplated that the relation of principal and agent should exist between them. It is true that the contract is called an "agency" by its terms, and that it says that the title to the tobacco is to remain in the Drummond Tobacco Company until sold by A. H. Schluter & Co.; but these statements in the contract are not of controlling effect. In *Heryford* v. *Davis*, 102 U. S. 235, it is said: 'What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. . . . It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that, if possible, or so far as possible, they all may harmonize.' In the case of *Mack* v. *Tobacco Co.*, 67 N. W. 174, a contract quite similar in its terms was held by the Supreme Court of Nebraska to be a sale, and not an agency. In *Arbuckle* v. *Kirkpatrick*, 39 S. W. 3 (36 L. R. A. 285), the Supreme Court of Tennessee discusses fully the principles here involved, and, tested by that decision, the contract here in question should be regarded and treated as a sale. The case of *Kaufman* v. *Alexander*, 53 Tex. 562, while it does not decide the exact point, yet the general principles announced in it are applicable, and they are in harmony with the cases above cited. The same may be said of *Brewing Co.* v. *Anderson* (Tex. Civ. App.) 40 S. W. 737. The only purpose, outside of an ordinary sale, which appears to us as reasonably discoverable from the contract and dealings of the parties, is that the Drummond Tobacco Company should have the right to fix, from time to time, the price at which the

tobacco should be sold. Even if A. H. Schluter & Co. had agreed absolutely to the price at which they would sell the tobacco, this would not have neutralized the elements of a sale, and constituted the contract an agency. It would have been a personal covenant, of no controlling effect in determining the question here involved. It is quite unnecessary to determine how far such an element in a contract would be affected by the anti-trust statute. The judgment of the court below is reversed, and judgment is here rendered for appellants."

A STATUTE authorizing administration upon the estate of a person who has not been heard from for seven years is held unconstitutional in *Carr* v. *Brown* (R. I.) 38 L. R. A. 294, since administration upon the estate of a living person deprives him of property contrary to the law of the land, or without due process of law.

THE enhancement of a wife's premises by additions and improvements made thereon with her consent, out of her husband's earnings, is held, in *Trefethen* v. *Lynam* (Me.) 38 L. R. A. 190, to render her liable to his creditors, although she has a right to receive his earnings and entirely consume them in the suitable support of the family without becoming liable to his creditors. See 3 Va. Law Reg. 430.

A RIGHT of action for injuries sustained in Mexico by a railroad employee who lives in Texas, against an employer incorporated in Massachusetts, is held, in *Evey* v. *Mexican Cent. R. Co.* (C. C. App. 5th C.) 38 L. R. A. 387, to be within the jurisdiction of a Federal court in Texas, notwithstanding the fact that the law of Mexico differs much in respect to the remedy in such cases, including a provision for successive actions.